(18824)

In the Supreme Court of the United States

October Term, 1898.

No. 329.

DANIEL CROKE, Plaintiff in Error,

vs.

FRANK ADAMS, JOHN T. SUTTON and THOMAS E. GRIFFITH, Commissioners [illegible] Board of the City and County of Denver, and [illegible] ARMSTRONG, Clerk of [illegible] Denver, [illegible], Defendants in Error.

In Error to the Supreme Court of the State of Colorado.

BRIEF OF [illegible]

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 100.

DANIEL CRONIN, PLAINTIFF IN ERROR.

vs.

FRANK ADAMS, JOHN T. BOTTOM AND WILLIAM H. GRIFFITH, CONSTITUTING THE FIRE AND POLICE BOARD OF THE CITY OF DENVER, AND HAMILTON ARMSTRONG, CHIEF OF POLICE OF THE CITY OF DENVER, DEFENDANTS IN ERROR.

In Error to the Supreme Court of the State of Colorado.

STATEMENT OF CASE.

Case No. 18625 in this court is a companion to this. Both were decided by the Supreme Court of Colorado against Daniel Cronin. Both grew out of the same transactions. This was an injunction case to restrain the destruction of property interests, caused by the arrests of Cronin and his patrons by the fire and police board of the city of Denver, that arose from the arrest of Cronin and his being fined by the County Court.

The printers, or the clerks of the Supreme Court of Colorado, or of some other court, have these two cases mixed, in that in the transcript of record in this case, No. 18624, there is found on page 7 the assignment of errors belonging to No. 18625, and on page 4 of the transcript of record of No. 18625 appears the assignments of errors in this case, No. 18624.

The plaintiff in error, Daniel Cronin, was arrested and fined $50.00 by the Police Court for violation of sections 745 and 746 of article 15 of Ordinance No. 101, of the series of 1898, of the city of Denver and state of Colorado, entitled "Liquor saloons, dram shops and tippling houses," which sections prohibit women from entering a saloon and being served therein with liquor, and prohibits the proprietors of said saloons from selling any spirituous liquors to any woman. Said sections are as follows:

"Section 745. Each and every liquor saloon, dramshop or tippling house keeper, licensed under the provisions of this article, who shall by himself or his agent, clerk or servant, permit any gambling or riotous or disorderly, indecent or offensive conduct in or about his place of business or premises, or who shall have or keep in connection with or as part of such liquor saloon, dramshop or tippling house, any wine-room or other place, either with or without door or doors, curtain or curtains, or screen of any kind, into which any female person shall be permitted to enter from the outside, or from such liquor saloon, dramshop or tippling house, and there be supplied with any kind of liquor whatsoever, shall, upon conviction, be fined as hereinafter provided.

"Section 746. No person, whether as principal, clerk, agent or servant, having charge or control of any liquor saloon, dramshop or tippling house, or

place where intoxicating or malt liquors are sold or given away, or any place adjacent thereto, or connected therewith in any manner whatsoever, either by doors or otherwise, shall suffer or permit any female person to be or remain in such liquor saloon, dramshop, tippling house, or other place where intoxicating or malt liquors are sold or given away for the purpose of there being supplied with any kind of liquor whatsoever. No person owning or having charge or control of any liquor saloon, dramshop or tippling house shall employ or procure, or cause to be employed or procured, any female person to wait or in any manner attend on any person in any dramshop, tippling house or liquor saloon, or in any place adjacent thereto or connected therewith where intoxicating or malt liquors are sold or given away; nor shall any female person be or remain in any dramshop, tippling house, liquor saloon or place adjacent thereto or connected therewith, and wait or attend on any person or solicit drinks in any such place."

Subsequently, and on May 24, 1901, Cronin filed his complaint in the District Court, sitting in and for the city of Denver and county of Arapahoe, and applied for an injunction against the fire and police board and the chief of police of the city of Denver, asking that they be restrained from arresting the plaintiff for violation of sections 745 and 746 of Ordinance No. 101, of the series of 1898, and from stationing or maintaining police officers or other persons at or near the plaintiff's premises for the purpose of compelling the observance of said sections of said ordinance, and that said sections be declared void (folios 28 to 34, inclusive).

As grounds for the relief prayed for, among other things the plaintiff alleged that he had fitted up a sa-

loon at great expense, with show cases, bar, glassware, tables, chairs, ice box, and other appliances, and had stocked it with ales, wines, beers, whiskeys and other liquors, and was conducting said business under a license of the city of Denver; that he was deriving profits enough from his business to support himself and family; that his premises were so divided off by partitions that one room could be used for a storage room, and the other for the purpose of serving his customers and patrons; that all of said rooms were included in one, but were partitioned off and divided by partitions extending toward, but not reaching, the ceiling; and that it had been his custom and habit to serve beverages to women the same as to men; that his place was orderly, and no person was allowed to become intoxicated therein; that the fire and police board, after having him fined for violating said sections of ordinance, stationed men about his premises, and threatened him and his patrons, as they would come up, with arrest if they entered the place, and thereby destroyed his business; that they constantly threatened to arrest him, and that he would be unable to pay his fines, and his business would be destroyed; and alleged that said ordinance and charter provisions were contrary to the Constitutions of the state of Colorado and of the United States (folios 28 to 33, inclusive).

Whereupon, the said District Court granted an injunction, enjoining and restraining the defendants from arresting the plaintiff for violating said sections and from arresting any woman or women in or upon plaintiff's premises, upon any charge made in connection with sections 745 and 746, and from interfering

with the said plaintiff's business upon any charge made in connection with said sections 745 and 746 until the further order of the court (folio 40).

That afterward, and on, to wit, May 27, 1901, there was a demurrer filed by the defendants to said complaint—that the complaint does not state facts sufficient to constitute a cause of action—and on the said date a motion was also filed to dissolve said injunction. (See folio 42.)

That afterward, and on the 3d day of July, 1901, the said District Court, after argument, overruled said demurrer, and denied said motion to dissolve said injunction, and entered an order and judgment making said injunction permanent. (See folios 51 to 53, inclusive.)

That afterward such proceedings were had that said case was taken, on appeal by the defendants in error, to the Supreme Court of the state of Colorado, and on, to wit, the 5th day of May, 1902, Chief Justice Campbell, of the Supreme Court of Colorado, rendered a decision, reversing the decision of said District Court, and holding *inter alia,* in effect, that said sections 745 and 746 of the ordinance were not void, but a legitimate exercise of the police power of the state, and dismissing the action.

Cronin contended in the Supreme Court of Colorado and in the *nisi prius* court, that his civil rights were being invaded and his property and business destroyed by the actions of the fire and police board and the chief of police of the city of Denver; that where such a state of facts were shown, an injunction would lie to prevent it.

The case was heard in the *nisi prius* court on a demurrer to the complaint, and so the facts as stated in the complaint stand admitted. He contended that the ordinances and the charter provision allowing the council to pass such ordinance were repugnant to the Constitutions of Colorado and of the United States, and were, therefore, void. Judge Campbell (folio 65) refrained from deciding whether injunctive relief was properly granted. This may have been, because, in the companion case in that court (No. 18625, in this court), the question of injunctive relief is not raised, and there the court was placed squarely against the proposition of deciding the constitutionality of the charter provision and the legality of the ordinances. There can be no doubt that injunctive relief was proper. Our briefs in the Supreme Court of Colorado are printed in full in the transcript of record, and those questions are fully discussed. (See Appellee's Brief, folios 86 to 110; Appellee's Brief, folios 113 to 186; Brief on Motion for Re-hearing, folios 189 to 196; Brief used on oral argument, folios 198 to 203; and, in addition thereto, the case of Tramway Co. vs. Londoner, 20 Colo., 150, which is an authority sustaining the granting of injunctive relief.)

Plaintiff filed a motion for a re-hearing, which was denied, and this cause is brought to this court by writ of error, to reverse this ruling and to have these sections declared void, because they conflict with the Constitutions of the United States and of the state of Colorado, and with the laws of Colorado.

ERRORS SUPREME COURT, COLORADO.

The Supreme Court of Colorado erred in reversing the judgment of the District Court of Arapahoe county, Colorado. It erred in deciding that sections 745 and 746 of the compiled ordinances of the city of Denver are valid and not in conflict with the Constitutions of the United States and of the state of Colorado. It erred in deciding that said sections 745 and 746 are valid upon the ground that they are restrictions upon saloonkeepers alone, and could properly be made and enforced against saloonkeepers, and that they do not constitute a violation of the rights of women under the Constitution of the United States. The court erred in holding said ordinances valid as proper exercise of the police power in the regulation of the liquor traffic, because the regulation of the liquor traffic is not involved in this question. The decision of the Supreme Court of the state of Colorado is erroneous in holding the ordinance valid on the ground that such ordinance was enacted in the aid of public morality, for the reason that there is nothing in the record in this case, nor in the ordinances, that shows such to have been the purpose of the ordinance, or that the enforcement of the sections of the ordinance would in any way aid or affect public morality. The Supreme Court of the state of Colorado erred in failing and refusing to affirm the judgment of the District Court of Arapahoe county. The court erred in holding that the sections of the ordinance in question prohibiting any persons owning or having charge of a saloon, from permitting any female person to be, or remain, upon the premises is valid, because the

legislature has a right to make any restriction or condition which it deems proper in regard to carrying on the saloon business or the selling of liquors, in that the question here is not the regulation of the liquor traffic at all, but is an effort to discriminate against women as a class, and such discrimination works a hardship to the plaintiff in error and damages his business. These sections of the ordinance do not purport to regulate the liquor traffic; they purport to prevent a certain class—namely, women, on account of their sex—from being in a saloon or wine room. The court erred in holding the said sections valid, as being in the aid of public morality, for the reason that the ordinance, in general terms, prohibits women from being in any place where liquors are sold; but, before the question of public morality may be raised, other conditions must exist than the presence of women in a place where liquors are sold. Under such ruling, if liquors were sold in a woman's club, conducted by women and frequented by women exclusively, every member of the club would be convicted of violating this ordinance, and we contend that the ordinance does not, by its terms, nor does the statement of facts in the pleadings, show that it can be in the aid of public morality.

ARGUMENT.

In order that the position of plaintiff in error may be clearly comprehended by the court, we say, at the outset, that while we contend that this ordinance is unreasonable, arbitrary, partial and oppressive, we do not seek to have it declared void for these reasons alone, because it is true that the power to adopt this ordinance—these sections thereof—was expressly conferred by the general assembly upon the city council of the city of Denver by the fifth clause of subdivision 12 of section 20 of the charter, which is as follows:

"That no liquor saloon, dramshop or tippling house shall have or keep in connection with, or as part of such saloon, tippling house or dramshop, any wineroom or other place, either with or without doors, curtain or curtains, or screen of any kind, into which any female person shall be permitted to enter from the outside, or from such tippling house or dramshop, and there be supplied with any kind of liquor whatsoever."

And we admit that these sections of this ordinance, being expressly authorized by this specific and definite legislative authority—and being within the express powers granted—can not be held to be void, because unreasonable, for the reason that the court in such case can only construe the extent of the grant, and has, and can have, nothing to do with the reasonableness of an ordinance carrying this grant into effect. *But* the contention is, that this charter provision is void—and hence the ordinance adopted in pursuance of its grant—because it violates certain consti-

tutional provisions of the United States, and of the state of Colorado, and because it is contrary to and in violation of other statutory provisions of the state of Colorado regarding the civil rights of its citizens, and because the enforcement of it nullifies those provisions and takes away these civil rights.

These provisions, constitutional and statutory, thus violated, are these:

Article XIV, amendments to the Constitution of the United States, is as follows:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make, or enforce, any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The Constitution of the State of Colorado, Article II, section 3, being section 276, page 145, Mills' Annotated Statutes, is as follows:

"Section 3. That all persons have certain natural, essential and inalienable rights, among which may be mentioned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property, and of seeking and obtaining their safety and happiness."

Section 25, Article II, of the Constitution of the State of Colorado, being section 298, page 199, Mills' Annotated Statutes, is as follows:

"Section 25. That no person shall be deprived of life, liberty or property without due process of law."

In chapter 27, laws of Colorado, entitled "Civil Rights," at section 427, page 575, Mills' Annotated Statutes, there is found this statutory enactment, to wit:

"That all citizens of this state, regardless of race, color or previous condition of servitude, shall be entitled to full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, restaurants, churches, barber shops, public conveyances, theaters, and other places of public resort or amusement."

We shall consider these statutory and constitutional provisions in the inverse order to that in which they are cited herein.

The provision guaranteeing civil rights and entitling all persons to the full and equal enjoyments of all * * * places of public resort and amusement is clearly violated by the enforcement of this ordinance. This provision—section 427, Mills' Annotated Statutes—was taken from our sister state, Illinois. In construing statutes, great weight is rightfully given to the construction prevailing in the state from which the statute is taken.

In Joseph Baylies vs. Josephine M. Curry, 128 Illinois, page 287, this statute was under consideration by the Supreme Court of Illinois. This was a case where a negro woman was denied access to a theater on account of color. The court says:

"It would be difficult to employ more comprehensive and sweeping language to abolish all distinctions in accommodations, facilities, privileges * * * than that thus employed. * * * It is not contended, nor in our opinion can it reasonably be contended, that these sections are inoperative by reason of repugnance to provisions of the Constitution of this state, or of the United States."

Our provision, then, is a valid law, operative and not unconstitutional. If any person violates or aids in violating this law—section 427—it is provided, on conviction, that they shall be fined not more than $500, or imprisoned in the county jail not exceeding three months, or by both such fine and imprisonment, at the discretion of the court. *That is,* if any person *prevents* another from having free access to places of public resort or amusement they violate the law, and are liable to a fine and a degrading punishment; while the ordinance in question provides that if any person *permits* any one of a large class of our citizens, to wit, all women, to have free access to such places of public resort or amusement, they are liable to a fine and a degrading punishment. If he *prevents* such free access, he is punished by virtue of our bill of civil rights; if he *permits* such free access, he is punished under the provisions of this ordinance. We submit that they are diametrically opposed, repugnant, the one to the other, and that both can not be valid, constitutional laws.

In Railroad Company vs. Brown, 17th Wall, page 445, a negro woman recovered $1,500 damages for being excluded from a car.

These were both cases of women of color—the judgments would have been the same had the exclu-

sion been of white women.—The bill of rights gives this free and equal enjoyment and access to *all* citizens—women are citizens.

The ordinance in question denies this free, equal enjoyment and access to all women, white and black.

Sedgwick, in his work on the construction of statutory and constitutional law, at pages 400 and 401, says:

"It is a general rule that municipal by-laws and ordinances must not be in conflict with the general law."

And in commenting on a case—Davis vs. Mayor, etc., 1 Duer, page 451—wherein it was contended that the courts had no power to interfere with the municipal legislation of a city, it is said:

"Although such a municipal body is clothed with legislative and even political powers, yet in the exercise of all its powers, it is just as subject to the authority and control of courts of justice, to legal process, legal restraint and legal correction as any other body or person, legal or artificial."

Thus it is evident, that a city can no more than a natural person violate the Constitution of the United States, or of the state, and that municipalities have no power to repeal, directly, or indirectly, the laws of the state, and that their legislation must accord with the policy of the legislature of the state.

It is plain that this ordinance is contrary to this section 427 of the statute, in denying to a large class of citizens equal access and enjoyment to places of

public resort and amusement; and that such law is void there is abundant authority.

City of New Orleans vs. Oscar Phillipi, 9 La. Ann., page 44.

Siloam Springs vs. Thompson, 41 Ark., page 461.

Alfred Haywood vs. The Mayor, 12 Ga., page 405,

where it is said:

"The general assembly can not confer upon a corporation the power by ordinance to repeal a statute of the state. A by-law of a corporation repugnant to the Constitution, common or statute law of the state, is void."

Additional authorities might be cited, *ad infinitum*. We do not think this court will question this law. The question is, Can a municipality, under the guise of establishing police regulations and regulating the morals of the community, enact ordinances violating existing laws and constitutional provisions? We think not. This matter will be discussed further herein in this brief, under the head of police regulations, morals and general welfare.

It has been shown sufficiently from the decisions of the state of Illinois, from whence our bill of rights is taken, and from other decisions, the authority of which will not be questioned, that our section 423 is an operative, wise, legal and constitutional enactment. Indeed, Chief Justice Campbell, of the Supreme Court of Colorado, in his adverse decision, practically admits that section 423, Mills' Annotated Stat-

utes, preserves to all citizens of the state (women among them) equal enjoyment of accommodations, advantages, facilities and privileges of inns, * * * and other places of public resort or amusement; but says:

"With respect to the latter contention, it is sufficient merely to say that if this section, 423, when enacted, gave to women the right equally with men to frequent saloons, *and if such right depended solely upon statute* (italics are ours) it was taken away by the general assembly when at a later date it adopted a charter for the city of Denver, whereby authority was conferred upon the city to deprive women of the enjoyment of the so-called right."

It is submitted that this is assuming the constitutionality of the very provision in dispute, to wit: the constitutionality of this charter provision. How could the legislature confer upon the city the authority to deprive a large class of citizens of the equal enjoyment of places of public resort? By the passage of an unconstitutional enactment?

It is reiterated that section 423 and this charter provision upon which this ordinance is based, are absolutely inconsistent and repugnant—that they can not both stand—that one is void, and it has been shown that section 423 is such an enactment as is upheld in all jurisdictions; but it is *not true* that such right depends solely upon this statute. A woman's right to go to such places, and a proprietor's right to receive her, is guaranteed both by the Constitution of the United States, and by the Constitution of the State of Colorado.

Section 25, Article II, of the Constitution of the state of Colorado, found at page 199, Mills' Anno-

tated Statutes, is violated by this ordinance passed in pursuance of this unconstitutional charter provision, in two ways:

First, it deprives all women—a large class of our citizens—of their freedom and liberty to go to any and all places of public resort and amusement, and to drink what and where they please without due or any process of law.

Second, it deprives a large class of our business community—all merchants dealing in wines and liquors at retail, a licensed and lawful business—of their property, without due process of law, by forbidding them under heavy penalties from selling their merchandise to women, who compose nearly, or quite, half of our population, thus limiting their sales and curtailing their profits, and thereby depriving them of their property as effectually as if actually confiscated.

This constitutional prohibition is also in the Constitution of the United States, forbidding any state from depriving any person of life, liberty or property without due process of law, and is contained substantially in all the state Constitutions, and has been construed innumerable times; and it is unnecessary to cite authorities to this court to show that the consensus of opinion in all jurisdictions is, that whenever private property is taken without due process of law, this constitutional provision is violated; no matter what the character of the proceeding be—it is immaterial whether it be administrative, judicial, summary or other—it matters not; the object sought to be achieved by the provision is, that in each state there shall be established an administration of law such as

will promote general justice—justice to each and all—black and white—men and women—without any distinctions—equal and impartial, recognizing and not impairing the individual rights of each and every citizen.

This ordinance is a legislative promulgation to the effect, that this business—the selling of wines, beer and liquor—was prejudicial to the welfare and morals of a community, was in fact a nuisance, and it is sought to be abated by abridging the liberty of all women, and by curtailing the profits, taking the property without process of law of numerous business men engaged in the retail sale of liquors. A municipal body can not do this lawfully. They can not by ordinance or enactment declare any particular thing a nuisance which has not theretofore been pronounced to be such by law or so adjudged by judicial determination.

This is a constitutional question, and the intention is to argue it upon principle, and not to burden the court unnecessarily by the citation of supposedly analogous cases; but we wish just here, to call the attention of this court to an opinion rendered by the lamented Justice Miller, in the case of Yates vs. Milwaukee, reported in 10 Wall, at pages 504, 505. He says:

"This riparian right is property, and is valuable, and though it must be enjoyed in due subjection to the rights of the public, it can not be arbitrarily or capriciously destroyed or impaired. It is a right of which when once vested the owner can only be deprived in accordance with established law, and if necessary that it be taken for the public good, upon due compensation. The act of the Wisconsin legislature,

approved March 31, 1854, confers upon the city of Milwaukee the authority to establish dock and wharf lines on the banks of the Milwaukee and Menominee rivers and restrain and prevent encroachments upon said rivers and obstructions thereto, and it is by this statute that the summary proceedings for the removal of appellant's wharf are supposed to be authorized. But the mere declaration of the city council of Milwaukee that a certain structure was an encroachment or obstruction did not make it so; nor could such declaration make it a nuisance unless it in fact had that character. It is a doctrine not to be tolerated in this country that a municipal corporation, without any general law, either of the city or of the state, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property of the city at the uncontrolled will of the temporary local authorities. Yet this seems to have been the view taken by counsel who defended this case in the Circuit Court; for that single ordinance of the city declaring the wharf of Yates a nuisance and ordering its abatement, is the only evidence in the record that it is a nuisance or an obstruction to navigation, or in any manner injurious to the public."

Note the similarities in the facts in this case and the case at bar.

Our property—the right to sell to all citizens who wish to buy—is valuable. It is being arbitrarily and capriciously destroyed and impaired. It is a vested right for which we have paid our license. We should not be deprived of it except in accordance with established principles of law.

Our legislature, like Wisconsin's, conferred upon the city authority to pass the ordinance.

As in the Wisconsin case there is no other evidence, than the ordinance itself, that the business was unlawful or injurious to public morals or a nuisance; nor could the declaration by ordinance make it so unless, in fact, it had that character, and here, as there, it may be said that any business in the city could be thus ruined by the action of these pro tem. law makers.

It has been frequently decided in Illinois, from whence we derive our laws as to the sale of liquors, that such sale is regulated under the power to prevent nuisances, and it is well settled,

"That a particular use of property is declared a nuisance by an ordinance of the city, does not make that use of property a nuisance, unless it is in fact so, and comes within the common law of statutory idea of nuisance."

See Wood on Nuisance, page 977, and authorities quoted in Note 1.

It is submitted that both on principie and the authority of the adjudged cases, it is clear that, while the authority of a municipality to enact ordinances and by-laws on the subject of the sale of spirituous and other intoxicating liquors, whether conferred by the general law of the state, or by special charter provision, is such as to authorize them to enact all ordinances which, in the judgment of the law-making power, tend to promote the general welfare of the community, that there is a limit beyond which they can not go. The ordinances must be in conformity to the general laws of the state, and they can not be such as are repugnant to and violative of the Constitution of the state, or of the United States; nor can they

be such as are utterly opposed to and nullify existing statutory laws, and such authority can not be construed as imparting to it the power to repeal the (general) laws in force.

Dillon on Municipal Corporations, sections 315, 316 and notes.

This same author cites, with approval, a decision by the Supreme Court of Tennessee, saying the decision reflected credit on the court which rendered it, where an ordinance was declared void which ordered the arrest, imprisonment and fine of all free negroes found out after 10 o'clock. It was oppressive, partial and unfair—this was before the war, and the constitutional amendments intended for the protection of colored people had not then been enacted—we cite the case for the reasoning contained in it, and because it is so heartily approved by this high authority—doubtless the same ruling would have followed had the ordinance been directed against women or any other class. The case is found in

Mayor vs. Winfield, 8 Humphrey (Tenn.), page 707.

That this ordinance is a special and unwarranted discrimination against a large class of citizens is too plain for argument. They are not, by law, allowed. (See section 322, Dillon, Municipal Corporations.)

The conflict between this ordinance and the laws and Constitution of the state is irreconcilable. As we have shown, the latter guarantees to all citizens certain rights to property and to privileges, and punishes any who prevent this access, while by the former,

to wit, the ordinance, all who permit such access to public places of amusement and resort are punished.

The Constitution is law—the fundamental law—and the courts have universally construed such laws as our bill of rights to be constitutional. Necessarily, this conflict being irreconcilable, this ordinance can not prevail. It, the ordinance, is not void solely because it is unjust, partial and oppressive, and because it violates natural, social and political rights of our citizens; but because it prohibits rights and privileges, and takes away property rights *guaranteed and protected* by the Constitution and laws of the state and of the nation; not only such rights as rest merely upon the Constitution, but upon the great principles of eternal justice which lie at the foundation of all free governments. As is well said, in People vs. Morris, in 13 Wend., page 325.

"These and other vested rights of the citizen are held secure and inviolable, even against the plenitude of power of the legislative department."

Neither the state nor its creature, a municipality, can exercise such surveillance over citizens as is attempted by this ordinance; they can not say to the merchant, you may sell to Irishmen, but not to Germans; to Americans, but not to Swedes; to men, but not to women; nor can they control the tastes, habits, appetites, dress, food or drink, of any class of citizens.

Broad and comprehensive as the police power is, it can not go this far; it can not, in opposition to the policy of established legislation, and in violation of constitutional enactments, take possession of the persons and property of its citizens absolutely, and regu-

late and reform them in such a manner as in the judgment of the lawmakers will produce the ideal mothers and fathers.

In order to show the legal meaning of the words "liberty" and "property," as used in the constitutional provisions, and to demonstrate that there is a deprivation of both in this ordinance, note the following from Mr. Justice Field, in Munn vs. Illinois, 94 U. S., page 142:

"By the term 'Liberty,' as used in the provision, something more is meant than mere freedom from physical restraint or the bounds of a prison. It means freedom to go where one may choose, and to act in such manner, not inconsistent with the equal rights of others, as his judgment may dictate, for the promotion of his happiness; that is, to pursue such callings and avocations as may be most suitable to develop his capacities and give to them their highest enjoyment."

"The same liberal construction which is required for the protection of life and liberty in all particulars in which life and lberty are of any value, should be applied to the protection of private property. If the legislature of the state, under pretense of providing for the public good, or for any other reason, can determine against the consent of the owner, the uses to which private property shall be devoted, or the prices which the owner shall receive for its uses, it can deprive him of the property as completely as by a special act for its confiscation and destruction. If, for instance, the owner is prohibited from using his building for the purposes for which it was designed, it is of little consequence that he is permitted to retain the title and possession."

The trade of Cronin, the plaintiff in error, was lawful. He had paid his license for the privilege of

selling alcoholic drinks, and his capital invested in preparing his place for the accommodation of this class of custom was fully protected by law. Now, can the municipality, by an enactment, annihilate this traffic?

It is true that they may in the exercise of police power for purposes of public utility to preserve the peace, health, tranquility and morality of the community, enact such laws as it may deem proper to accomplish these ends; but we urgently contend that its power in this direction is limited by the constitutional provisions, and that there are personal and property rights beyond and above its control, and this brings us to the consideration of the powers of municipalities to enact laws infringing such rights under their

Police Powers for the Protection of the Health and Morals of the Community.

May a saloon keeper sell liquor to women in the same manner as to men? That leads to the inquiry of whether the board did act legally, and whether Cronin might sell liquor on his premises to a woman the same as to a man. The defendants in error say "No;" that certain ordinances prohibit it. The plaintiff in error says these ordinances are illegal and void, as being in contravention of the Constitution of the United States and of Colorado, and of the laws of Colorado. Defendants in error seek to uphold them on the ground that the council in the exercise of the police power might pass an ordinance of that character.

The police power in its broadest acceptation means the general power of the government to

preserve and promote the public welfare, even at the expense of private rights.

New Orleans Gas Light Co. vs. Hart, 40 La. Ann., page 474.

4 Blackstone Com., 162.

Commonwealth vs. Alger, 7 Cushing (Mass.), 84.

Stone vs. Mississippi, 101 U. S., 814.

Generally speaking, it may be said that the police power is exercised by the legislative department of the government; that it is limited by constitutional provisions in the United States, and other fundamental law; that it can only be exercised within given rules, and for the public good; that rights guaranteed by the Constitution can not be violated; that if it is obnoxious to vested rights and unreasonable, the courts will declare the law void; that it must be exercised so that all are affected by it, and not one class favored and another class imposed upon.

These statements are borne out by the following quotations and citations:

"The legislature is clearly the department of the government which can and does exercise the police power."

Tiedeman's Limitations of Police Power, Sec. 2.

"The police power is limited by the state and federal Constitutions, the same as any other power."

Same authority.

While it will be conceded by everybody familiar with this question that, in the exercise of the police power, many salutary statutes have been upheld, on the contrary, simply because a legislature or municipal council says a law is enacted to protect the public morals, etc., does not make it so. That is to be determined by well established rules. Police power is circumscribed by the federal and state Constitutions.

"While it seems that everything necessary for the promotion and preservation of the public welfare may be done by the legislature in the exercise of the state's police power, it must be remembered that there are two written Constitutions fixing the limits which may not be transcended, viz.: The federal Constitution and the state Constitution."

18 Amer. and Eng. Enc. of Law, page 760.

"Like other powers of government, there are constitutional limitations to the exercise of police power. The legislature can not, under pretense of exercising this power, enact laws not necessary to the preservation of health and safety of a community that will be oppressive and burdensome upon the citizens. If it should do so, it would be the duty of the court to declare such legislative act void."

Toledo, etc., R. Co. vs. Jacksonville, 67 Ill., page 37.

People vs. Gillson, 109 N. Y., 389.

1 Dillon, Municip. Corp., 142.

Cooley, Const. Lim. (6th Ed.), chapter 16.

It is plain that any action by the legislature or a municipality which infringes upon the civil rights or

the property rights of any person will be set aside as unconstitutional and void, unless it is absolutely demanded by the common welfare. If the common welfare of a community demands that there shall be no sale of intoxicating liquors, it applies to sales to men as well as to women.

In the case of Mugler vs. Kansas City, 123 U. S., 623, which is considered to be leading case upon this subject, it is said:

"It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exercise of the police powers of the state. There are of necessity limits beyond which legislation can not rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute,—Sinking Fund Cases, 99 United States, 718,—the courts must obey the Constitution rather than the law making department of government, and must, upon their own responsibility, determine whether in any particular case these limits have been passed. To what purpose it was held in Marbury vs. Madison, 5 United States, 1 Cranch, 137, are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons upon whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. The courts are not bound by mere form, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry, whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect

the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so judge, and thereby give effect to the Constitution."

The Court of Appeals of Colorado quotes from this decision in the case of Platt, etc., Co. vs. Lee, 2 Colo. Court of Appeals, 184, and the case is also quoted in Platt, etc., Co. vs. Dowell, 17 Colo., 376.

What do these authorities mean?

They mean that in the exercise of the police power the legislature is controlled by constitutional enactments. That means that the constitutional provisions which are referred to control the legislature in its attempted exercise of the police power. In other words, when a Constitution guarantees to *every person* the same privileges and immunities, any act of the legislature, passed with the view of protecting the public morals or the public health, must apply to all individuals, unless those individuals be under some legal disability. It means that any act of the legislature, whereby it discriminates against women as such, is void. It means that if a legislature or municipality desires to regulate the liquor traffic, which it may do under the police power, it must exercise that police power so that it will apply to all of the citizens; in other words, if the legislature or city council desire to do away with wine rooms, it must provide that men shall not frequent them. It is impossible, under these constitutional limitations, to say that men may go in wine rooms, and that women may not. It is impossible to say that men may go in saloons and buy a drink of liquor, and wo-

men can not. If, in an exercise of police power, it is proper not to grant any license and to close all saloons, well and good; but it is not proper to close saloons to women and leave them open to men. It is not right to say that wine rooms may exist for men and not for women. If a municipal council does not see fit to do away with wine rooms altogether, and on the ground that the association of the two sexes together when drinking liquor is detrimental to the public morals, then the council should pass an ordinance, or the legislature should pass an act, making or providing for separate wine rooms for women and separate ones for men, and not say that there may be wine rooms or saloons for men, and none for women. It might even go that far in its regulations; but it can not go to the extent of depriving women of the privilege of a wine room, and allow it to exist for men.

In the case of the United States vs. Cruikshank, 92 U. S., 542, the Supreme Court observes that every republican government is in duty bound to protect its citizens in the equality of rights. The duty was originally assumed by the states, and it still remains there. The only obligation resting upon the United States government is to see that the states do not deny the right.

There can be no case found where the exercise of the police power for the protection of the public morals has ever been exercised in a discriminating way against a woman, simply because she was a woman. The police power may be invoked to regulate the liquor traffic; it may be invoked as a basis of legislative enactments as to the hours and places where liquor may be sold. If it is invoked to regulate wine rooms, it

must be invoked not against the class known as females, but it must be invoked against both sexes; and if it is invoked against both male and female, it may be invoked to prohibit the wine room entirely, or it may be invoked to provide separate wine rooms for women and men, if they are going to have wine rooms at all, and it appears that the association of the sexes is bad. Then there is no discrimination against women in favor of men. This would be in accordance with decisions in certain states, where the statute requires separate accommodations in coaches and carriages for the white and colored races.

Louisville, etc., R. R. Co. vs. State, 66 Miss., 662; affirmed in 133 U. S., 587.

Neither the legislature of the state nor the council of the city has authority to violate the constitutional guarantees under the guise of measures claimed to be for the protection of the public morals, the public health or the public safety.

The sale of intoxicating liquors is not an unlawful business. There is no constitutional provision prohibiting the sale of liquor to either men or women. Unless there is a constitutional prohibition, a woman has as much right, under the Constitution of the United States and of the state of Colorado, and under the laws of the state of Colorado, to enter a saloon and purchase a drink of whiskey or beer as a man. If she has the right to purchase the same as a man, the saloon keeper has the right to sell to her the same as to a man; and any ordinance which prevents him from selling to a woman, when he may sell to a man, is an invasion of his civil rights, and his property rights,

because the right to sell to a woman or to a man is a property right.

The word "person" is used in the constitutional provision, not male or female. It includes both. The male and the female have equal rights of enjoying their liberty, and of seeking and obtaining their safety and happiness. Under this provision a female has as much right to seek her enjoyment and happiness in the taking of a glass of beer or whiskey as the male, and any act by the municipality of the city of Denver, preventing her from so enjoying those rights, is a violation of the constitutional provision. It is equally a violation of the United States constitutional provision, and of the state of Colorado, to prohibit a saloon keeper from selling to a woman.

The provision of the United States Constitution, that no state shall pass a law which shall deny the equal protection of the laws to every citizen, applies with peculiar force to the provisions here, because, if the state can not pass such a law, a municipality can not. This matter is well considered, In re Mary McGuire, 57 Cal., page 604. In that case an ordinance of the city of San Francisco was claimed to be in conflict with the Constitution of the state of California, which constitutional provision was that—

"No person shall, on account of sex, be disqualified from entering upon or pursuing any lawful business, vocation or profession."

That constitutional provision is no broader than those we have quoted herein. It was there held that the ordinance prohibiting a woman from serving drinks in a bar room was in direct violation of said

constitutional provision. It was contended in that case that the inhibition or disqualification was not on account of sex, but on account of its immorality; that such employment of a woman is of a vicious tendency, and hurtful to sound public morality; that such business is not *malum in se*, but of a hurtful and immoral tendency, and on account of this immoral tendency it was claimed that the exercise of the authority given by that ordinance was nothing more or less than the exercise of the police power which is vested in the city, and the court said:

"This power to make police regulations is as much restrained by the section just referred to as is the legislative power vested in the senate and assembly. Both grants of power are alike made by the Constitution, and both are alike restricted by this section of the article. It may be further said of it, that it is prohibitory in its character, and needs no legislation to make it active in its effect. It is self-executing, and struck with nullity all acts in existence inconsistent with it as soon as the Constitution went into operation, and all since passed."

With reference to the question of the immorality of allowing women to drink in saloons or wine rooms, the court said:

"We will add here that the law-making power of the state is ample to make laws affecting both sexes alike, and not inhibited by the Constitution, which will accomplish the object so much desired—to prevent practices hurtful to public morality. The Constitution was not framed with a disregard of the important consideration urged upon us in this regard. It merely directs that a law which is framed to accomplish this object by affecting or operating upon

lawful callings, shall affect both sexes alike. We are not at liberty to say that such important matters were overlooked in framing our organic law.

"The ordinance and the law both being unconstitutional, there is no offense, and there can be no valid conviction and sentence; hence no jurisdiction for any purpose."

This decision is conclusive of the proposition that a woman has the same rights as a man. The whole policy of the law of this state has been to enlarge the rights of women and give them the same privileges and immunities which the male possesses.

There is no different rule, to be applied to ordinances concerning the liquor business, when the business is not prohibited by law, and other lines of business. An ordinance, therefore, which unjustly discriminates, as the ordinance in question does, as to the person to whom sales may be made, is invalid.

We have cited, and the defendants in error in the court below cited, the case of In re Mary McGuire, 57 Cal., 604. They have also cited the cases of

Ex parte Hayes, 33 Pac., 337.

Ex parte Christian, 88 Cal., 208.

Foster vs. Board of Police Commrs., 37 Pac., 763.

The point particularly decided in the McGuire case is that women had the right to be employed in saloons to serve drinks, the same as men. The later just mentioned take the contrary view. We desire to call the court's attention to the difference between the employment of a woman to serve drinks and the serving to a woman of drinks by a saloon keeper. The

late California cases refer only to the employment of women to serve drinks, and base their decisions upon the ground that in the exercise of police power a municipality may regulate the liquor traffic; and that includes the power to say who shall and who shall not deal out drinks in a saloon or wine room. The distinction to be drawn between the cases cited and the case at bar is that the question here presented is not a question of the regulation of the liquor traffic. It is an attempt on the part of the municipal authorities to discriminate as to the class of persons or individuals who may purchase liquor, and is an infringement upon the rights of that class and the individuals composing it, and not a regulation of the liquor traffic.

In other words, the question of whether a woman has the right to buy a drink, and as to whether the saloon keeper has a right to sell it to her, are questions which are covered by the Constitutions of the United States and the state of Colorado, guaranteeing to both the rights claimed for them; whereas, the question of who should and who should not serve drinks in a saloon does not involve a right which is guaranteed by the Constitution; and again, the discrimination, or attempted discrimination, against a woman to purchase a drink, and the saloon keeper selling it to her, does not involve the regulation of the liquor traffic. It is based upon the fact that she is a female and not a male, which is saying that under the guise of the police power they can discriminate against the female sex, in violation of the law of the land; and right here it is pertinent to inquire what is meant by

THE LAW OF THE LAND.

Webster puts it in a nutshell—

Dartmouth College vs. Woodward, 4 Wheaton, 519.

Works of Webster, Vol. 5, page 487.

"By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society.

"Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land." And he continues: "If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgment, and acts directly transferring one man's estate to another, legislative judgments, decrees and forfeitures, in all possible forms" (and he might have added, unconstitutional ordinances depriving one of his property and liberty to wear, eat and drink) "would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void.

"It would tend directly to establish the union of all powers in the legislature. There would be no general, permanent law for courts to administer or men to live under. The administration of justice would be an empty form, an idle ceremony; judges would sit to execute legislative judgments and decrees; not to declare the law or administer the justice of the country."

Before Cronin could rightfully be deprived of his property by having his sales curtailed, there should

have been some competent complaint, presentment or indictment, declaring his place as conducted to be a nuisance; or declaring it, as conducted, to be subversive of morality, and a trial and judgment to that effect. Otherwise he is deprived of his property without due process of law—in defiance of the Constitutions, state and federal.

Again, Cooley, the eminent constitutional lawyer and author, says, at pages 431 and 432, in his work on constitutional limitations, this:

"The words, 'by the law of the land,' as used in the Constitution, do not mean a statute *passed for the purpose of working the wrong* (the italics are ours)—that construction would render the restriction absolutely nugatory, and turn this part of the Constitution into mere nonsence. * * * When the law of the land is spoken of, undoubtedly a pre-existing rule of conduct is intended; not an *ex-post-facto* rescript or decree made for the occasion. The design is to exclude arbitrary power from every branch of the government, and there would be no exclusion if such rescript or decrees were to take effect in the form of a statute."

Again, Justice Johnson, in Bank of Columbia vs. Okley, 4 Wheaton, pages 235 to 244, says:

"What is meant by the law of the land? * * * There can be no hesitancy in saying that the words mean the common law and the statute law existing in this state at the adoption of our Constitution. Altogether they constitute a body of law prescribing the course of justice, to which a free man is amenable for all time to come."

What is the police power? Chief Justice Shaw, in Commonwealth vs. Alger, gives the municipality al-

most unlimited power—not quite. He says in the above case, cited in Cooley's Constitutional Limitations, page 705, and approved by that author:

"We think it is a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. * * * The power we allude to is the police power. The power vested in the legislature by the Constitution, to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, *not repugnant to the Constitution* (the italics are ours), as they shall judge to be good for the commonwealth and the subjects of the same."

There can be no doubt that the police power is limited by the constitutional provisions. In the 14th amendment to the Constitution we find:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The decisions of the Supreme Court of the United States establish the principle that a state legislature or a municipal council may enact laws and ordinances regulating the conduct of citizens, provided such statutes or ordinances operate upon all citizens equally and are in regard to subjects within the police power of the state.

The question in this case is whether the police power of the state justifies the sections of the ordinances in question.

The plaintiff in error contends that the restrictions of these ordinances are invalid, because they do not operate equally upon all persons, and because they tend to deprive certain persons of the right to do business and acquire property.

The decision in the case of the Gulf, Colorado & Santa Fe Ry. vs. Ellis, 165 U. S., page 160, holds:

"That such classification can not be made arbitrarily. The state may not say that all white men shall be subjected to the payment of attorney's fees of parties successfully suing them, and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

The Supreme Court of Colorado, In re Morgan, 26 Colo., 415, holds that the constitutional provision is violated by a statute which unjustly and arbitrarily singles out a class of persons and imposes upon them restrictions from which others similarly situated are exempt, and that such a statute is also invalid as class legislation. It is held that the regulation of any business must be confined to its public side, and that protection of the health of individuals engaged in certain occupations does not justify a statute regulating the

number of hours persons engaged in such occupations may work. And the court says:

"Then it is only one step further to provide by law the style and quality of garments the citizen may wear, the quantity and quality of food he may eat, and the beverage he may drink."

See, also,

State vs. Loomis, 115 Mo., 307-314.
Vanzant vs. Waddell, 2 Yerger, 260-270.
Dibrell vs. Morris Heirs, 15 S. W., 87-95.
Bell's Gap R. R. vs. Pa., 134 U. S., 232.

Under the principles stated in the foregoing cases, the classification of the ordinance which allows a man to go into saloons and prohibits women from being present there is invalid.

The question of morality, which the supreme Court of Colorado claims justifies the ordinance, is not involved in this case, because it nowhere appears that the ordinance is based upon any such question; and neither that court nor this can assume that the question of morals had anything to do with the passage of the ordinance. The case was decided particularly upon the pleadings. No testimony was offered as to the effect of the presence of women in the saloons, and there is nothing in the record upon which to base a claim that evil effects follow from the mere presence of women in saloons, and if such evil effects do result they can be done away with by legislation which will act equally and uniformly upon all classes of persons.

There is much said in the briefs in the Supreme Court of the state of Colorado (which are printed in full in the transcript of record) that is not mentioned in this brief. We invite attention of the court to those arguments, and to the authorities cited.

We believe we have clearly shown, both on principle and authority, that the sections of the ordinance in question are illegal and void; that the action of the fire and police board was without warrant or authority in law; that it invaded the civil rights of Cronin, and this invasion resulted in the destruction of his property and business, and therefore, that the judgment of the Supreme Court of Colorado should be reversed.

In conclusion, we wish to add one word in relation to

ETHICS, MORALS AND LAW.

At the outset of this argument we said that we should argue this question on principle; that we sought to have the ordinance in question declared void, not for the reason that it was oppressive, partial and unfair, alone; but because it was in violation of the provisions of the fundamental law of the land. We have, inexcusably perhaps, trespassed upon the time of the court more than was justifiable in the citation of authorities establishing elementary principles.

It is true, as was said by the court below, that no woman is here complaining of this ordinance; but it is also true that the only theory upon which it is sought to be upheld is that business of the plaintiff in error, as conducted, was prejudicial to the virtue and morals of women, and hence its suppression was in furtherance of the public welfare.

We are willing to admit that, were this a question of morals or ethics alone, it would be a good thing to prevent men, as well as women, from patronizing tippling houses and dramshops.

But this is a constitutional, and not an ethical or moral question.

When we consider the complicated apparatus providing against the change or amendment of our Constitution, requiring the consent of the legislatures of three-fourths of the several states and the deciding judgment of the Supreme Court in all matters of dispute, it may well give us pause in obeying the enactments of a legislative body confessedly going beyond their powers to the end that morality may be subserved, as they aver.

The "Glory of God" is no doubt greatly to be desired. The judges of the Salem witches desired it. Pilate desired it when he condemned Jesus of Nazareth. But who is to be the judge—and who is to point the way? We say the *fundamental* law, the HIGHER law, the CONSTITUTION.

A body of well-meaning men might convene and pass an ordinance to the effect that lynch law may be resorted to in extreme cases, for the greater safety of society, for the protection of the chastity and virtue of our women, for the upholding of morals, by the greater intimidation of criminals, notwithstanding the sixth commandment—Thou shalt not kill; or, that a man may, when the emergency arises, which to him seems justifiable, take of another's goods without his knowledge or consent, thus abrogating the law—Thou shalt not steal. But the great mandates given from Mt. Sinai would still be obligatory on mankind—the *higher* law prevails.

It is not the province of government or of law to deal with the finer and more vital issues which go to the upbuilding of the moral and religious world. The Constitution and all lesser laws made in accordance with it, deal but with the political structure of society. They have no more to do with individual personal freedom of action than they have with the matter of wardrobe, the regulation of our kitchens, the choice of a place of worship, or the morality of dancing or card playing. A merchant might as legally be enjoined from selling women corsets, in the interest of the healthy bodies of future generations, as a liquor dealer from selling her wine, which is not good for her.

The city council might as well, and with equal propriety, designate the streets along which she may walk, as the places she may be allowed to frequent. In fact, she is licensed to carry on business, under certain restrictions and for certain moneys, as much worse than wine bibbing as falling over a precipice is worse than peeping over the edge. In either case it is, and must be, a matter of her own choice and responsibility.

As we said, it is not our province to decide on the ethics of the case. But upon the law, *under* the Constitution. A man or a woman under the law may worship Jehovah or Juggernaut, according to his or her lights or leadings, without fear of adverse injunction.

Women are citizens, and in Colorado exercise the right of suffrage, and for any inferior legislative body to discriminate against her because of sex is to go counter to the principle which is the foundation stone of our national government.

That woman should be pure and chaste and hedged about by all the protections possible to insure her exemption from temptation is not to be accomplished by legal enactment.

In the early days of Massachusetts, one of the most important enactments passed at the first general court for elections in the spring of 1631, was the one by which it was declared that no man should be admitted to the body politic who was not a member of the church within its limits—

"The test of citizenship was piety and the test of piety was the Reformed Church."

But we have moved on since then. Out of the throes of the Revolution our Constitution was born. Alexander Hamilton and Thomas Jefferson were at the birth, and under the wise and nurturing care of Jay, of Marshall, of Taney and of Chase, and their distinguished and eminent coadjutors and successors, it has grown to a lusty manhood, and its benign provisions extend their blessings impartially over more than seventy millions of people, residing between the Atlantic and Pacific, and between the Lakes and the Gulf, and in the Isles of the Pacific; and it is not for any body of two by four, or 16 to 1, temporary legislators to control its provisions or to abridge the property or personal rights of any class of its citizens by their *dictum*.

We would fain bring it to pass that woman should live always "In the atmosphere of pure serenity and light and exaltation;" but she may not do this through ordinances and injunctions decreeing this and forbidding that.

The beauty of holiness, like the beauty of a sunset, is beyond the reach of the law. It is from higher sources than those dealing with the political structure of society—liberty or license are within the power of every woman—the liberty which sets free or the license which enchains—all this is aside from the domain of law. We are bound by the severest restrictions to the provisions of a Constitution which places bounds and limits beyond which the law can not interfere. To every man his idol, and to every woman her fetich, if they so desire, and no law can interfere. Our personal desires and tastes are our own, and no legal enactment can say us nay.

Equalization of privileges is within the scope of good government. Using or abusing them is the boon or bane of every free man and woman, and its responsibility is purely and *forever* personal.

If liquor selling is to be legalized, for God's sake let us not split hairs over it, nor add to the iniquity by assailing the integrity of the Constitution in ordinances striving to confine it to men. Woman is but "lesser man," and where he leads she will follow, whether it be upward to Paradise or downward to the nethermost Hell.

Rather cut at the root of the tree—nor hope to cure an evil by enactments striking at personal liberty, and adverse to the law and the Constitution.

Respectfully submitted,

MILTON SMITH,
Attorney for Plaintiff in Error.